SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. ~~968~~ 57

IRVING TRUST COMPANY AND THOMAS F. McGLONE, JR., AS EXECUTORS UNDER THE LAST WILL AND TESTAMENT AND CODICIL THERETO OF JOHN J. McGLONE, DECEASED, ET AL.,

Appellants,

vs.

CHASE L. DAY, AS EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF HELENA DAY McGLONE, DECEASED.

APPEAL FROM THE SURROGATE'S COURT OF KING'S COUNTY OF THE STATE OF NEW YORK.

STATEMENT AS TO JURISDICTION.

WILLIAM H. ORR,
LENNOX C. BRENNAN,
RALPH L. KASKELL, JR.,
Counsel for Appellants.

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COURT OF APPEALS OF THE STATE OF NEW YORK

IN THE MATTER OF THE APPLICATION OF IRVING TRUST COMPANY AND THOMAS F. McGLONE, JR., AS EXECUTORS UNDER THE LAST WILL AND TESTAMENT AND CODICIL THERETO OF JOHN J. McGLONE, DECEASED, FOR A DETERMINATION OF THE RIGHT OF HELENA DAY McGLONE TO ELECT UNDER SECTION 18 OF THE DECEDENT ESTATE LAW TO TAKE AGAINST THE PROVISIONS OF SAID LAST WILL AND TESTAMENT AND CODICIL THERETO OF JOHN J. McGLONE, DECEASED.

IRVING TRUST COMPANY AND THOMAS F. McGLONE, JR., AS EXECUTORS UNDER THE LAST WILL AND TESTAMENT AND CODICIL THERETO OF JOHN J. McGLONE, DECEASED, THOMAS F. McGLONE, ROSE McGLONE MEREDITH, EDWARD McGLONE AND ROBERT McGLONE, INFANTS, by RALPH L. KASKELL, JR., SPECIAL GUARDIAN,

Appellants,

against

CHASE L. DAY, AS EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF HELENA DAY McGLONE, DECEASED,

Respondent.

STATEMENT IN SUPPORT OF JURISDICTION.

The appellants, Irving Trust Company and Thomas F. McGlone, Jr., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, deceased, Thomas F. McGlone, Rose McGlone Meredith, and Edward McGlone and Robert McGlone, infants, by Ralph L. Kaskell, Jr., Special Guardian, in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal, respectfully represent:

(A) Statutory Provisions Sustaining Jurisdiction.

The statutory provision which sustains the jurisdiction of the Supreme Court of the United States is Section 344 (a)

of Title 28 of the United States Code, reading, to the extent relevant here, as follows:

> "Sec. 344 (a). Final judgment or decree in any suit in the highest court of a State in which a decision could be had * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon appeal."

(B) Statute of the State, the Validity of Which is Involved.

The statute of the State of New York, the validity of which has been sustained by the Court of Appeals of the State of New York, the highest Court of said State, as not being violative of or repugnant to the Constitution and Laws of the United States, is Subdivision 9, Section 18 of the Decedent Estate Law (Chapter 229, Section 4, Laws of 1929, as amended by Chapter 174, Section 1, Laws of 1930). The provisions thereof are:

> "9. The husband or wife during the lifetime of the other may waive the right of election to take against a particular last will and testament by an instrument subscribed and duly acknowledged, or may waive such right of election to take against any last will and testament of the other whatsoever in an agreement so executed, made before or after marriage. An agreement so executed, made before the taking effect of this section wherein a spouse has waived or released all rights in the estate of the other spouse shall be deemed to release the right of election granted in this section."

(C) Date of Judgment and Date of Application for Appeal.

The date of the final decree, entered in the Surrogate's Court, Kings County upon the remittitur of the Court of Appeals of the State of New York, which is now sought to

be reviewed, is January 24th, 1941, and the date of the final order of the Court of Appeals which is also sought to be reviewed, and pursuant to which said final decree was entered, is December 31st, 1940. The time for taking the appeal began to run on the date of the entry of the final decree in the Surrogate's Court, King's County, to wit, January 24th, 1941. The date on which the application for appeal was presented was the 24th day of March, 1941.

Under the provisions of Section 350 of Title 28 of the United States Code, the appellants may bring their appeal within three months after the entry of said decree in the Surrogate's Court, Kings County.

(D) Nature of Case and Rulings Below.

The decedent, John J. McGlone and Helena Day McGlone (then Helena Day Snyder) were married in England on February 4th, 1922. This was his first and her third matrimonial experience, she having first been married to one by the name of Lewis and secondly to a man named Snyder. Mrs. Snyder had no children. She was about sixty-two years old when she married Mr. McGlone. On or about February 2nd, 1922, or about two days before her marriage to Mr. McGlone, she made and delivered to him a document on a letterhead of the Savoy Hotel, London, reading as follows:

"The Beverleys,
Osterley, Middlesex, England.
February 2, 1922.

Savoy Hotel,
London
WC2

I, Helena Day Snyder, being of sound mind and in possession of all my faculties, on the eve of my marriage to John J. McGlone, in London, England, on February 4th, 1922, wish to record, of my free will, that,

as I already possess, in my own right, ample of this world's goods in the way of a fortune of my own, as a compliment to my aforesaid husband, and for other good and sufficient reasons, I hereby voluntarily and irrevocably, renounce all right, title and interest I might, legally or otherwise, have in any estate, real or personal, of which my said husband to be, John J. McGlone, might die seized.

HELENA DAY SNYDER.

There was no issue of the marriage between John J. McGlone and Helena Day Snyder.

John J. McGlone died on February 22nd, 1937. He left him surviving his widow, Helena Day McGlone, a sister, Rose McGlone Meredith, two brothers, Thomas F. McGlone and Ignatius V. McGlone, and three nephews, Thomas F. McGlone, Jr., Edward McGlone and Robert McGlone, the last two named being infants over the age of fourteen years.

The Last Will and Testament of John J. McGlone was executed on August 21st, 1930. This was prior to the effective date of Section 18 of the Decedent Estate Law.

The third paragraph of the Will reads as follows:

"THIRD: My dear wife, HELENA DAY MCGLONE, being in possession of ample funds of her own and having waived all claim of dower or participation in any part of my estate, I nevertheless desire that there shall be paid over to her out of my estate the sum of Two Thousand ($2,000.00) Dollars, or if she should prefer, then at her request instead of the payment of Two Thousand ($2,000.00) Dollars, my Executors shall purchase for her and deliver to her any piece of jewelry which she may select costing up to Two Thousand ($2,000.00) Dollars, as a slight token of my love and affection for her and admiration of her noble and high traits of character."

On July 6th, 1934 (after the effective date of Section 18 of the Decedent Estate Law) said John J. McGlone

executed a Codicil to said Last Will and Testament. This Codicil did not disturb the foregoing provision of the Will.

Said Last Will and Testament and Codicil thereto were admitted to probate on April 8th, 1937, on which date Letters Testamentary were issued to appellants, Irving Trust Company and Thomas F. McGlone, Jr.

On September 23rd, 1937, said Helena Day McGlone served a notice of election to take her share of the estate as in intestacy pursuant to the provisions of Section 18 of the Decedent Estate Law. This proceeding was then commenced by the Executors. One George A. Voss, Esq., was appointed Special Guardian for said infants, Robert McGlone and Edward McGlone, and as such Special Guardian and also as attorney for Ignatius V. McGlone, served and filed an answer consenting to a decree as prayed for in the petition. Thomas F. McGlone and Rose McGlone Meredith served and filed an answer also consenting to a decree as prayed for in the petition. The widow, Helena Day McGlone, served and filed an answer, which was amended by stipulation. The answer contained no affirmative defense.

A motion for judgment on the pleadings was made by all parties (Papers on Appeal, In re McGlone's Will, 256 App. Div. 1074, 11 N. Y. Supp. 2nd, page 3). This motion was denied by the Surrogate upon the ground that a presumption of fraud flows from the mere relationship of the parties, and that it was necessary for the petitioners to plead and prove as part of their *prima facie* case that the agreement was not induced by fraud or inequitable conduct. The order denying the motion for judgment on the pleadings was affirmed, but the Appellate Division reversed the Surrogate on the law of the case, holding:

> "In the opinion of this court no presumption exists by reason of the relation existing between the parties, at the time the paper writing was made and delivered. Matter of Rogers' Will, 250 App. Div. 26, 293 N. Y. S.

626. The burden of pleading inequality, fraud or overreaching is upon the widow".

Mrs. McGlone did not amend her answer.

The case was tried on May 25th, 1939. In presenting their *prima facie* case petitioners relied upon the admissions in the pleadings and three documents which were received in evidence without objection.

The first of these was a stipulation dated September 14th, 1938, by which Mrs. McGlone admitted the delivery to Mr. McGlone of the paper writing above referred to at the time of its execution, and amended her answer accordingly. The second was the aforementioned agreement signed by Mrs. McGlone (then Helena Day Snyder). Mrs. Snyder's signature was conceded to be valid. The third was the authenticated record of the marriage, which disclosed that Mr. McGlone was then forty-seven years of age and the Vice-President of the International Mercantile Marine Co., and that Mrs. Snyder represented herself to be forty-five years of age. The proof revealed that the statement as to her age was untrue; that her real age was sixty-two.

The Surrogate decided that Mrs. McGlone had not waived or released her right to elect under Section 18 of the Decedent Estate Law and had effectively exercised such right of election.

Mrs. McGlone died after the trial and entry of the original decree, and the proceeding thereafter became a contest between the brothers, sister and nephews of Mr. McGlone and the next of kin of Mrs. McGlone.

The Appellate Division unanimously reversed on the law and the facts.

The Appellate Division found and decided that the agreement was made by Mrs. McGlone voluntarily, understandingly and under circumstances which were free from inequality and unfairness; that it had a valid consideration;

that it was made to induce the marriage, and that the marriage constituted the consideration. That Court further stated in its opinion, (258 App. Div. 596, 17 N. Y. Supp. 2nd 316 at 322, 323):

"When that instrument was executed on February 2, 1922, there vested under it in the testator certain contract rights. The instrument was valid under the pre-existing statutes (sec. 53, Domestic Relations Law, sec. 31, subdiv. 3, Personal Property Law), which did not require an acknowledgment; and an antenuptial agreement made in a foreign country is enforcible in this state (Lemye *v.* Sirker, 226 App. Div. 159, 161, Ross *v.* Ross, No. 1, 233 App. Div. 626).

This vesting occurred before the enactment of subdivision 9, section 18, Decedent Estate Law (Laws of 1929, chap. 229). The subsequent enactment therefore violated the testator's constitutional rights (U. S. Const., art. 1, sec. 10; N. Y. State Const., art. 1, sec. 6). By the former a state is forbidden to pass any law impairing the obligation of contracts; and the latter provides that a person shall not be deprived of property without due process of law. As subdivision 9 invades the contract rights vesting in McGloae prior to its enactment, it is invalid (Walker *v.* Whitehead, 83 U. S. 314; Edwards *v.* Kearzey, 96 U. S. 595; Tennessee *v.* Sneed, 96 U. S. 69; Louisiana *v.* New Orleans, 102 U. S. 203; McCahey *v.* Virginia, 135 U. S. 662; Coolidge *v.* Long, 282 U. S. 582; Holmes *v.* Holmes, 4 Barb. 295, 303; Ralph *v.* Cronk, 266 N. Y. 428; Matter of Goldberg, 275 N. Y. 186, 189).

The entire sentence, however, need not be invalidated. It will be sufficient to sever, void or delete the words "so executed". It is universally recognized that a statute may be constitational in part and unconstitutional in part, and that the invalid part may be severed from the remainder, if after the severance the remaining portions are sufficient to effect the legislative purpose deducible from the entire act, construed in the light of contemporary events. 'The question is in

every case whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether' (People ex rel. Alpha P. C. Co. *v.* Knapp, 230 N. Y. 48, 54, 60, per Cardozo, J.; People *v.* Mancuso, 255 N. Y. 463, 472, 473). The deletion of the words "so executed" does not pervert the legislative purpose. That purpose was to save agreements previously executed. The language, however, went beyond this purpose and prescribed a form of execution more exacting than was required by pre-existing statutes and, as a consequence, violated previously vested contract rights under agreements whose form complied with the earlier statutes.

This view has the further effect of recognizing that the sentence with the deletion of the words "so executed" becomes declaratory, in substance, of the pre-existing statute law (sec. 53, Dom. Rel. Law; sec. 31, subdiv. 3, Pers. Prop. Law) through which contract rights vested in the testator under the instrument of February 2, 1922, and which were acted upon by McGlone at the time of the marriage on February 4, 1922. So far as the form of the instrument, therefore, it is completely effective as being in compliance with subdivision 9, section 18, Decedent Estate Law, so far as the same is valid".

Chase L. Day, as Executor under the Last Will and Testament of Helena Day McGlone, deceased, then appealed to the Court of Appeals of the State of New York. That court reversed the order of the Appellate Division and decree of the Surrogate's Court entered thereon, and affirmed the original decree of the Surrogate. A final judgment and decree, on the remittitur of the Court of Appeals was thereupon entered in the Surrogate's Court, Kings County, on the 24th day of January, 1941.

The Court of Appeals did not disagree with any of the findings of the Appellate Division, except its conclusion that the statute aforementioned is repugnant to the Consti-

tution of the United States and invaded the contract rights which vested in the decedent prior to its enactment.

Annexed hereto and made part hereof are the opinions of the Appellate Division and Court of Appeals above referred to. Also annexed hereto and made part hereof is a copy of the opinion of the Surrogate of Kings County rendered after the trial of the issues in this proceeding.

(E) Substantiality of Questions Involved.

Appellants respectfully submit that the questions involved in their appeal to the Supreme Court of the United States are of a substantial nature, although it is well established that an appeal will not be dismissed for want of a substantial Federal question unless the contentions of the apellant are "clearly not debatable and utterly lacking in merit". *Hamilton* v. *Regents of the University of California*, 293 U. S. 245, 258.

The estate of the decedent, as valued in the estate tax proceedings, amounted to $236,852.74. As a result of the decision of the Court of Appeals, one-half of the net amount of this estate will be taken from the brothers, sister and nephews of Mr. McGlone and turned over to Mrs. McGlone's next of kin, a result which is clearly contrary to the spirit and letter of the agreement between the parties, and the provisions of Mr. McGlone's Will and Codicil. The unanimous opinion of the Appellate Division that the statute invaded the constitutional rights of the testator and is invalid indicates that the contentions of the appellants are not lacking in merit. These contentions should be passed upon by the Supreme Court of the United States before a result so unjust becomes absolute.

Further, the appeal presents a question, the determination of which is important to all persons who prior to the effective date of Section 18 of the Decedent Estate Law

entered into an agreement, which is subscribed but not acknowledged, under which either or both of the parties waived all interest in the estate of the other. The Court of Appeals held such an agreement ineffective upon the ground that the right of election may not be waived in advance of its creation. The decision of the court on that question is directly contrary to the unanimous decision of the Appellate Division, Fourth Department (concurred in by Justices Sears and Lewis, when members of that court) in the case of *In re Smith's Estate*, 243 App. Div. 348, 276 N. Y. Supp. 647 at 651. In that case the court said:

> "If the execution of this release was the free and unrestrained act of the appellant, and if her intention to relinquish every right which she had or might thereafter have in her husband's estate is clear and certain, then, undoubtedly, the instrument will prevent her from taking advantage of her statutory privilege of election, even though that right did not exist at the time of the execution of the release."

Unless this decision is reversed all such agreements will be nullified, notwithstanding the fact that they were entered into in good faith for a valid consideration, and clearly indicate an intention to relinquish every right in the estate of the deceased spouse.

Furthermore, this decision makes it impossible for two people hereafter to effect a binding contract in contemplation of marriage by the terms of which either or both waive all interest in the estate of the other, since under this decision the Legislature can render such contract ineffective by a subsequent enactment modifying rights of inheritance and recognizing a waiver only if executed in a manner not theretofore required.

For the reasons aforementioned, the appeal presents a substantial Federal question. *Senn* v. *Tile Layers Protective Union*, 301 U. S. 468, 476.

The Supreme Court has jurisdiction to entertain an appeal from the decision of the State court on the ground that a State statute violates a clause or clauses of the Constitution of the United States. *Smith* v. *Cahoon*, 283 U. S. 553; *Aero Mayflower Tea Co. v. Georgia Public Service Commission*, 295 U. S. 285; *Hartford Steam Boiler Co.* v. *Harrison, Insurance Commissioner*, 301 U. S. 459; *American Toll Bridge Co.* v. *Railroad Comm.*, 307 U. S. 486; *Curry* v. *McCanless*, 307 U. S. 357; *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95.

The Federal questions were raised by the appellants above named at all stages of this proceeding from its very inception. They raised the Federal questions by motion for judgment on the pleadings before trial, by brief submitted in connection with the trial and upon both appeals in the Appellate Division and the appeal to the Court of Appeals.

Appellants respectfully submit that the Supreme Court of the United States has jurisdiction of this appeal.

ORR & BRENNAN,
Attorneys for Petitioners-Appellants, Irving Trust Company and Thomas F. McGlone, Jr., as Executors, etc., Rose McGlone Meredith and Thomas F. McGlone.

RALPH L. KASKELL, JR.,
Special Guardian Appearing per se.

EXHIBIT "A".

COURT OF APPEALS, TUESDAY, DECEMBER 31, 1940.

In the Matter of the Application of IRVING TRUST COMPANY and THOMAS F. MCGLONE, JR., as Executors under the Last Will and Testament and Codicil Thereto of JOHN J. MCGLONE, Deceased, for a Determination of the Right of HELENA DAY MCGLONE to Elect under Section 18 of the Decedent Estate Law to Take Against the Provisions of Said Last Will and Testament and Codicil Thereto of JOHN J. MCGLONE, Deceased.

IRVING TRUST COMPANY, et al., Respondents; CHASE L. DAY, as Executor under the Last Will and Testament of HELENA DAY MCGLONE, Deceased, Appellant.

(Decided December 31, 1940.)

Appeal by executor from unanimous order of Appellate Division, second department, reversing Surrogate on law and facts. Matter remitted.

Andrew F. Van Thun, Jr., for appellant.

Ralph L. Kaskell, Jr., and Philip Zierler for respondents.

LEHMAN, Ch. J.:

The widow of John J. McGlone, a resident of Kings county, who died in February, 1937, served notice upon the executors under his last Will and testament that she elected to take her share of the decedent's estate "as in intestacy" pursuant to section 18 of the Decedent Estate Law (Cons. Laws, ch. 13) (added by chapter 229 of the Laws of 1929 and thereafter amended). The executors, claiming that the widow had waived and renounced all rights in her husband's estate, instituted proceedings pursuant to section 145-a of the Surrogate's Court Act for a determination of the validity and effect of the widow's attempted election. The Surrogate sustained the widow's right to an election. The Appellate Division reversed the decree of the Surrogate and remitted the matter to the Surrogate's Court for the entry

of a decree determining that an instrument executed by the widow in February, 1922, constitutes "a complete bar to the right of the widow to elect to take against the will and codicil of the testator".

On February 4, 1922, the decedent, John J. McGlone, and Helena Day Snyder were married in England. In contemplation of that marriage Helena Day Snyder, on February 2, 1922, signed the paper writing which, it has been held, bars her right to take a share in her husband's estate. It reads as follows: "I, Helena Day Snyder, being of sound mind and in possession of all my faculties, on the eve of my marriage to John J. McGlone, in England, on February 4th, 1922, wish to record, of my free will, that, as I already possess, in my own right, ample of this world's goods in the way of a fortune of my own, as a compliment to my aforesaid husband, and for other good and sufficient reasons, I hereby, voluntarily and irrevocably renounce all right, title and interest I might, legally or otherwise, have in any estate, real or personal, of which my said husband to be, John J. McGlone, might die seized". She was at that time sixty-two years of age.

The decedent provided as follows for his wife in the third paragraph of his will, which he executed on August 21, 1930: "Third. My dear wife, Helena Day McGlone, being in possession of ample funds of her own and having waived all claim of dower or participation in any part of my estate, I nevertheless desire that there shall be paid over to her out of my estate the sum of Two Thousand ($2,000.00) Dollars, or if she should prefer, then at her request instead of the payment of Two Thousand ($2,000.00) Dollars, my executors shall purchase for her and deliver to her any piece of jewelry which she may select costing up to Two Thousand ($2,000.00) Dollars, as a slight token of my love and affection for her and admiration of her noble and high traits of character".

At the time he executed the will, section 18 of the Decedent Estate Law was not yet in effect and a husband was free to bequeath all his property to strangers. His wife would, in such case, have no right to any share in his estate, though she would have a right of dower in his real property, except

as she might have parted with, waived or lost such right of dower.

Thereafter, however, on July 6, 1934, the testator executed a codicil to the will of August 21, 1930. He did not therein make any additional provision for his wife or disturb the provision previously made; but since the term "will" as defined in the statute includes all codicils as well as will (Decedent Estate Law, Sec. 2), his wife, by force of the statute, became entitled upon the execution of the codicil to a right of election to reject the provision made for her in the will and to take her share of the estate "as in intestacy". Then, for the first time, the question became important whether the renunciation by the wife in 1922 of "all her right, title and interest in any estate real or personal" of which her "husband to be, John J. McGlone, might die seized" has the effect of barring her from asserting her statutory right of election created by a later statute.

The same section of the statute which creates, for the benefit of the surviving spouse of a decedent, a right not previously enjoyed, also provides the manner in which that right may be waived. "The husband or wife during the lifetime of the other may waive the right of election to take against a particular last will and testament by an instrument *subscribed and duly acknowledged*, or may waive such right of election to take against any last will and testament of the other whatsoever in an agreement so executed, made before or after marriage. An agreement *so executed* made before the taking effect of this section wherein a spouse has waived or released all rights in the estate of the other spouse shall be deemed to release the right of election granted in this section". (Decedent Estate Law, Sec. 18, subd. 9.) The statute was intended, it is plain, to deny effect to a waiver not executed in accordance with the statute.

The statute requires that the agreement or instrument of waiver shall be "duly acknowledged" as well as subscribed and the instrument of waiver upon which the executors and legatees rely to defeat the right of election claimed by the widow was subscribed but not acknowledged by her. For that reason, as well as on other grounds, the Surrogate found that the instrument was without effect. The reversal by the Appellate Division is based upon its conclusion that

in so far as the statute denies effect to an unacknowledged agreement of waiver or renunciation, previously executed which, even without acknowledgment, was valid at the time it was executed, the statute violates the testator's constitutional rights guaranteed by article 1, section 10, of the Constitution of the United States and by article 1, section 6, of the Constitution of this State, and is, therefore, void. The Appellate Division rejected, for reasons stated in the opinion, the other grounds upon which the Surrogate based his contention that the waiver was ineffective.

We have examined these other grounds and without now deciding whether all of them are without substance we assume that the Appellate Division did not err in rejecting them; but we are constrained to disagree with the conclusion of the Appellate Division that the testator acquired by the instrument, executed in 1922 in contemplation of marriage, contractual rights, protected by the Constitution of the United States, which have been invaded by the new statute. We may assume, without now deciding or even considering such questions further, that the instrument of waiver, though unilateral in form, evidences "a contract made between persons in contemplation of marriage" within the meaning of section 53 of the Domestic Relations Law (Cons. Laws, ch. 14); that it is executed in manner which satisfies the requirements of section 31 of the Personal Property Law (Cons. Laws, ch. 41); and that any contractual rights created by that instrument are within the protection of the constitutional guaranty that the State may not impair the obligations of contracts or take property without due process of law. That brings us to the question; what are those contractual or property rights which it is said are destroyed by the new statute?

Whatever be the extent of those contractual rights they did not include the right of the husband to bequeath his estate to such persons in such amounts as he chose and thus to exclude his wife from any share of his estate. That right was created by the laws of the State of New York, not by contract. The wife did not, of course, waive her right to take any part of the estate of her "husband to be" which he chose to bequeath to her, nor may the instrument be given effect as a waiver of a right of a wife to succeed to the prop-

erty of her husband, which the Legislature might thereafter create. Since rights of descent and distribution of a decedent's estate are created by the law of the State, the State may change or take away such rights though it may not take away property which has vested by virtue of such rights. (Matter of Sherman, 153 N. Y. 1; Norris *v.* Beyea, 13 N. Y. 273.) A wife cannot by agreement make the husband's right created by law immune from the right of the State to change the law which created the right nor waive in advance a right created for her benefit if the law does not permit such a waiver.

The widow makes here no claim for dower. She asserts no right which, at the time she executed the waiver of her rights in her husband's property, she might have asserted but for the waiver. The Legislature has determined to restrict the husband's rights, previously unrestricted, to provide by will how his property should pass at his death. Even then the Legislature did not decree that a will previously executed should not take effect at the testator's death in accordance with its terms. It decreed only that if a testator chose to execute a new will section 18 of the Decedent Estate Law would apply and that the testator's spouse would then have rights in the decedent's estate which the spouse would otherwise not possess. The Legislature did not by such statute destroy any rights *which the decedent in this case acquired by the waiver*—even though we give to such waiver the broadest possible construction and effect. The Legislature, with undoubted power to create for the benefit of the spouse of a testator a new right of succession to property and a new limitation upon the power of a testator to determine the succession or distribution by will, had also undoubted power to protect the newly-created right by a statutory provision that a spouse might not waive the benefit of the right created for his or her benefit except by an instrument executed with the formalities set forth in the statute. Quite probably the testator would not have executed a codicil to the will if he had known that his widow might, on that account, claim an interest in his estate which she would not otherwise have. That does not, however, give rise to an estoppel or other equitable ground for denying to the wife her statutory right.

The order of the Appellate Division should be reversed and the decree of the Surrogate's Court affirmed, with costs in this court and in the Appellate Division to all parties filing briefs payable out of the estate.

Loughran, Finch, Rippey, Sears, Lewis and Conway, JJ., concur. Ordered accordingly.

EXHIBIT "B".

SUPREME COURT, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT.

LAZANSKY, *P. J.*, CARSWELL, JOHNSTON, ADEL and CLOSE, *JJ.*

In the Matter of The Application of IRVING TRUST COMPANY and THOMAS F. MCGLONE, JR., as Executors under the Last Will and Testament and Codicil Thereto of John J. McGlone, Deceased, for a Determination of the Right of Helena Day McGlone to Elect under Section 18 of the Decedent Estate Law to Take Against the Provisions of Said Last Will and Testament and Codicil Thereto of John J. McGlone, Deceased; IRVING TRUST COMPANY and THOMAS F. MCGLONE, JR., as Executors, etc., of the Estate of John J. McGlone, Deceased, and EDWARD MCGLONE and ROBERT MCGLONE, Infants, by RALPH L. KASKELL, JR., Special Guardian, IGNATIUS V. MCGLONE, THOMAS F. MCGLONE and ROSE MCGLONE MEREDITH, *Appellants;* CHASE L. DAY, as Executor under the Last Will and Testament of HELENA DAY MCGLONE, Deceased, *Respondent.*

Appeal by Irving Trust Company and Thomas F. McGlone, Jr., as executors, etc., of the estate of John J. McGlone, deceased, and by others, from a decree of the Surrogate's Court of the County of Kings, entered in the office of the clerk of said court on the 27th day of June, 1939.

Philip Zierler, for appellants Irving Trust Company and Thomas F. McGlone, Jr., as executors, etc., of John J. McGlone, deceased, Thomas F. McGlone and Rose McGlone Meredith.

Ralph L. Kaskell, Jr., Special Guardian, for appellants Edward McGlone and Robert McGlone.

Andrew F. Van Thun, Jr. (George H. Burtis with him on the brief), for the respondent.

CARSWELL, *J.*:

The executors of the testator petitioned that it be decreed that his widow was not entitled to elect, under section 18, Decedent Estate Law, to take against his will and codicil. Upon the executors' proof, the widow adducing none, the Surrogate decreed that the widow had the right so to elect and had effectively exercised it. The executors and certain next of kin of the testator appeal. The widow died after the decree was entered and has been succeeded by her executor. This proceeding, therefore, has become a contest between the brothers, sister and nephews of the husband and three nieces of the widow.

The facts are not in dispute. They are contained in the pleadings, certain stipulations and two documents.

On February 2, 1922, the testator John J. McGlone and Mrs. Helena Day Snyder, American Citizens, were in London, England. On that day Mrs. Snyder signed a document. She recited in it that she was of sound mind and, as the occasion was the eve of her marriage to McGlone on February 4, 1922, she wished to record of her own free will that she had ample property and a fortune of her own and as a compliment to her prospective husband and for other good reasons she voluntarily and irrevocably renounced all right, title and interest that she might have, legally or otherwise, to share in any estate of McGlone of which he might die seized. This instrument in script, on a letterhead of the Savoy Hotel, was in the handwriting of an unidentified person. Mrs. Snyder's signature was conceded to be valid.

On February 4, 1922, McGlone and Mrs. Snyder were married. This was his first and her third marital venture. The authenticated record of the marriage discloses that McGlone was forty-seven years of age and an officer of a steamship line, and that Helena Day Snyder was forty-five years of age and a widow. The proof reveals this reference to forty-five years was incorrect; that her real age was

sixty-two. She had no children by her prior marriages nor by this one.

On August 21, 1930, as a resident of Brooklyn, McGlone made a will in which he recited the execution by his wife of the February 2, 1922, document waiving all claim to any interest in his estate. He nevertheless provided that $2,000 should be used to purchase a token for her. On July 6, 1934, he executed a codicil which did not disturb the foregoing provision in the will.

On February 22, 1937, McGlone died. His will was admitted to probate on April 8, 1937. The widow executed and filed on September 23, 1937, an instrument purporting to be a notice of election, pursuant to section 18, Decedent Estate Law, to take against the will and codicil.

The first question is whether on the foregoing proof a presumption of constructive fraud arose from the mere relation of the parties at the time the February 2, 1922, instrument was signed; and whether because of such a presumption the executors were obligated to adduce affirmative proof that the parties dealt with each other on terms of equality and fairness and that the act of Mrs. Snyder was voluntary and well understood.

The respondent invokes such a presumption. It concerns elements which are a species of fraud. The general rule is that fraud vitiates all contracts, but that it is not presumed. An exception arises when the relations of the parties to a contract evoke a presumption of constructive fraud, which presumption requires one invoking the contract to prove affirmatively that it was not the product of undue influence, inequality, overreaching, deception or mistake. This presumption is ordinarily applied to the relationship of guardian and ward; trustee and cestui que trust; attorney and client; and physician and patient. It is also applied to other close relationships when it is affirmatively established by proof of circumstances that the parties are not dealing on an equal basis. (*Cowee* v. *Cornell*, 75 N. Y. 91, 99.) The presumption does not arise from the mere relation of parent and child. (*Cowee* v. *Cornell*, *supra*, p. 101; *Carpenter* v. *Soule*, 88 N. Y. 251, 256; *Jones* v. *Jones*, 137 N. Y. 610, 613; *Williams* v. *Whittel*, 69 App. Div. 340, 344.) Under the rule which stems from the foregoing cases,

no presumption arises merely from the equally close relation of husband and wife. (*La Tourette* v. *La Tourette*, 54 App. Div. 137, 138; *Green* v. *Benham*, 57 App. Div. 9, 14; *Doulon* v. *Doulon*, 154 App. Div. 212, 216, 217; *Matter of Rogers*, 250 App. Div. 26, 28; leave to appeal denied, 274 N. Y. 642; 30 C. J., 668, s. 244.) These cases enforce the rule that in such relationships, whether a presumption of inequality or constructive fraud arises "is a question of fact dependent upon the circumstances in each case. There is no presumption of inequality either way from these relations merely." (*Cowee* v. *Cornell*, *supra*, p. 101.) "The law does not presume aught" from this type of mere relationship. (*Williams* v. *Whittel*, *supra*, p. 344.) Judicial utterances, invoked to support a contrary view, are to be found only in cases, otherwise authoritative, where there was affirmative proof of circumstances of inequality which raised a presumption of constructive fraud and shifted to the proponent of the instrument the burden of going forward with proof that it was executed with understanding, without overreaching and free from any vitiating element. It is when a vitiating element, even though slight, appears that such an agreement is subjected to searching scrutiny. The latter type of cases involving the relationship of parent and child (*Green* v. *Rowcroft*, 113 N. Y. 462; *Barnard* v. *Gantz*, 140 N. Y. 249), and the relationship of husband and wife (*Pierce* v. *Pierce*, 71 N. Y. 154; *Graham* v. *Graham*, 143 N. Y. 573; *Lamb* v. *Lamb*, 18 App. Div. 250) is not applicable here. When properly read and analyzed, they manifest no essential conflict with the cases which control the instant case.

The burden of proving that the instrument of February 2, 1922, was validly executed rested upon the executors. (30 C. J. 668, s. 244; *In re Dunn's Estate*, *Dunn* v. *Dunn*, 224 N. W. 38 (Iowa).) The unchallenged proof that this instrument was genuine was sufficient to establish *prima facie* that it was binding upon the widow. (*Pimpinello* v. *Swift & Co.*, 253 N. Y. 159, 162; *Matter of Stone*, 272 N. Y. 121, 124.) The executors were not obligated to come forward with further proof in the absence of proof from the widow indicating that she dealt with her prospective husband under circumstances of inequality, or with lack of understanding of the effect of her act. If such proof, even though slight, had been

forthcoming, the burden or duty of going forward to rehabilitate the *prima facie* binding force of the instrument would then have shifted to the executors. The widow in seeking to repudiate her solemn writing was not aided by or armed with a presumption of inequality (*La Tourette* v. *La Tourette*, *supra*) in the absence of some proof casting suspicion upon or tending to vitiate the instrument.

It has long been the practice of courts to enforce antenuptial agreements, whether they related to existing or after acquired property, as such agreements are favored. (*Johnston* v. *Spicer*, 107 N. Y. 185, 194; *Matter of Estate of Young* v. *Hicks*, 92 N. Y. 235; *Green* v. *Benham*, *supra*.) The relationship between husband and wife is, of course, sufficiently close and confidential to require but little affirmative proof in order to cast the burden upon one invoking an instrument executed by a spouse to come forward with affirmative proof that it was executed under circumstances of equality and fairness. This proof may take the form of lack of knowledge on the part of the one resisting the instrument; differences in knowledge of the respective parties; differences in mental or bodily strength; or unfairness and the like. The instrument itself may reveal want of fairness and lack of equality. But none of these elements is present here. The widow might have created the presumption she invokes and cast the burden upon the executors of establishing the fairness of the instrument and its inequality, if she had made proof—no doubt readily available to her if it were the fact—that the recitals in the instrument were untrue; and by reason of such a circumstance the inference might have been drawn that she was not dealing on a plane of equality with McGlone. She proffered no such proof, so that the recital of admissions made by her must be deemed to be true.

This view makes the executors' proof take on added strength because the instrument furnishes evidence or affirmative proof, by these recitals, in the absence of repudiation or challenge of them by the widow, that she dealt with McGlone under circumstances that were free from inequality and unfairness. The document contains internal evidence that she was possessed of an independent fortune and that because thereof she understandingly renounced any

interest in her prospective husband's estate. Another circumstance in the record affirmatively points the same way. The marriage record discloses that the marriage took place two days after the instrument was signed. She gave her age as forty-five, when the fact is that she was sixty-two years of age when she married McGlone, who was then forty-seven years of age. This fact, and the further fact that it was her third marriage, give rise to implications that she was not lacking in experience or suffering from inequality. These facts also carry the further implication that the instrument was signed to induce the marriage.

These views respecting burden of proof were stated more briefly on a prior appeal in this case (256 App. Div. 1074) and result from a re-examination of the subject.

The next question concerns whether the form of the instrument of February 2, 1922, complies with section 18, subdivision 9, of the Decedent Estate Law. It was not executed by both spouses. It was not necessary that it should be so executed. A unilateral agreement is sufficient when it is acted upon by the other spouse. (*Matter of Moore*, 165 Misc. 683.) This view is in accord with the law as it existed before the enactment of that section. Under pre-existing statutes a unilateral agreement affecting the marriage relation and rights thereunder, when acted upon, was valid. (s. 53, Dom. Rel. Law; s. 31, subdiv. 3, Pers. Prop. Law; *Wright* v. *Wright*, 54 N. Y. 437; 30 C. J., 628, s. 185.)

It is asserted however that this instrument was merely subscribed and not acknowledged, as required by section 18, subdivision 9, Decedent Estate Law. That subdivision reads:

"The husband or wife during the lifetime of the other may waive the right of election to take against a particular last will and testament by an instrument *subscribed and duly acknowledged*, or may waive such right of election to take against any last will and testament of the other whatsoever in an agreement so executed, made before or after marriage. An agreement *so executed* made before the taking effect of this section wherein a spouse has waived or released all rights in the estate of the other spouse shall be deemed to release the right of election granted in this section."

The last sentence is the one here applicable. The words "so executed" contained therein incorporate by reference the requirement in the preceding sentence that the subscription shall be "duly acknowledged." The instrument therefore of February 2, 1922, does not comply with this requirement.

This necessitates determining whether the above last sentence is constitutional. If it is invalid the lack of an acknowledgment is not fatal to the instrument. When that instrument was executed on February 2, 1922, there vested under it in the testator certain contract rights. The instrument was valid under the pre-existing statutes (s. 53, Dom. Rel. Law; s. 31, subdivision 3, Pers. Prop. Law), which did not require an acknowledgement; and an antenuptial agreement made in a foreign country is enforceable in this State. (*Lemge* v. *Sirker*, 226 App. Div. 159, 161; *Ross* v. *Ross*, No. 1, 233 App. Div. 626.)

This vesting occurred before the enactment of subdivision 9, section 18, Decedent Estate Law (Laws of 1929, chap. 229). The subsequent enactment, therefore, violated the testator's constitutional rights. (U. S. Const., Art. 1, s. 10; N. Y. State Const., Art. 1, s. 6.) By the former a State is forbidden to pass any law impairing the obligation of contracts; and the latter provides that a person shall not be deprived of property without due process of law. As subdivision 9 invades the contract rights vesting in McGlone prior to its enactment, it is invalid. (*Walker* v. *Whitehead*, 83 U. S. 314; *Edwards* v. *Kearzey*, 96 U. S. 595; *Tennessee* v. *Sneed*, 96 U. S. 69; *Louisiana* v. *New Orleans*, 102 U. S. 203; *McCahey* v. *Virginia*, 135 U. S. 662; *Coolidge* v. *Long*, 282 U. S. 582; *Holmes* v. *Holmes*, 4 Barb. 295, 303; *Ralph* v. *Cronk*, 266 N. Y. 428; *Matter of Goldberg*, 275 N. Y. 186, 189.)

The entire sentence, however, need not be invalidated. It will be sufficient to sever, void or delete the words "so executed." It is universally recognized that a statute may be constitutional in part and unconstitutional in part, and that the invalid part may be severed from the remainder, if after the severance the remaining portions are sufficient to effect the legislative purpose deducible from the entire act, construed in the light of contemporary events. "The

question is in every case whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether." (*People ex rel. Alpha P. C.* v. *Knapp*, 230 N. Y. 48, 54, 60, per Cardozo, J.; *People* v. *Mancuso*, 255 N. Y. 463, 472, 473.) The deletion of the words "so executed" does not pervert the legislative purpose. That purpose was to save agreements previously executed. The language, however, went beyond this purpose and prescribed a form of execution more exacting than was required by pre-existing statutes and, as a consequence, violated previously vested contract rights under agreements whose form complied with the earlier statutes.

This view has the further effect of recognizing that the sentence with the deletion of the words "so executed" becomes declaratory, in substance, of the pre-existing statute law (s. 53, Dom. Rel. Law; s. 31, subdiv. 3, Pers. Prop. Law) through which contract rights vested in the testator under the instrument of February 2, 1922, and which were acted upon by McGlone at the time of the marriage on February 4, 1922. So far as the form of the instrument, therefore, it is completely effective as being in compliance with subdivision 9, section 18, Decedent Estate Law, so far as the same is valid.

This leaves one further question—that of consideration. The February 2, 1922, instrument had a valid consideration. The marriage constituted that consideration. It has long been recognized as "among the highest consideration known to the law." (*Kramer* v. *Kramer*, 90 App. Div. 176, 180; *DeCicco* v. *Schweizer*, 221 N. Y. 431, 438, 440; *Matter of Miller*, 77 App. Div. 473; *Wright* v. *Wright*, 54 N. Y. 437; *American Surety Co.* v. *Conner*, 251 N. Y. 1, 11.)

Accordingly, the instrument of February 2, 1922, under the proof herein constituted a complete bar to the right of the widow to elect to take against the will and codicil of the testator.

The decree of the Surrogate's Court of Kings County, in so far as appealed from, should be reversed on the law and the facts, with costs to appellants filing briefs, payable out of the estate of John J. McGlone, and the matter re-

mitted to the Surrogate's Court for the entry of a decree as prayed for in the petition herein.

EXHIBIT "C".

THE NEW YORK LAW JOURNAL, TUESDAY, JUNE 13, 1939.

Surrogate's Court.

By Mr. Surrogate Wingate.

Matter of Irving Trust Co., &c. (John J. McGlone, dec'd; File No. 1714, 1937)—In view of the earnest and repeated efforts of the petitioners to defeat the present widow's right of election without a hearing on the merits (Matter of McGlone, 166 Misc., 636; 169 Misc., 498, aff'd 11 N. Y. S., 2d, 3, not yet otherwise reported), the actual trial of the issues appeared as something of an anti-climax.

No testimony was introduced, the composite showing being the introduction into evidence of three documents, namely, first, a stipulation amending the answer of the widow so as to admit her subscription and delivery of the paper upon which her opponents rely to defeat her rights; secondly, the paper itself; and thirdly, a certified copy of the marriage certificate of the parties, showing the consummation of their marriage on February 4, 1922. Finally a stipulation was entered on the record that the asserted renunciation or waiver by the present widow of rights in the estate of her husband was not in her handwriting but in that of some other unidentified individual and that the only portion thereof which was written by her was the signature.

It follows, both sides having rested, that the issue raised by the executors to the effect that the widow is precluded from exercising her asserted right of election must be determined on this meagre demonstration and on the showing of the record, consisting preponderantly of the allegations of the petition in so far as they are not denied.

In view of the denials of paragraphs seventh to eleventh of the petition except for the admission in paragraph two

of the answer that the widow signed and delivered to the decedent the alleged waiver, and the failure to introduce any evidence in support of the allegations therein made, they must, except for the noted admissions be excluded from consideration in the evaluation of the composite situation.

As thus reduced to lowest terms, the record demonstrates that the parties validly intermarried on February 4, 1922. Two days prior to the solemnization of the nuptials, the present widow signed and turned over to the decedent a document which had not been prepared by her, and "knowledge of the nature, terms and effect" of which she denies. This document reads as follows:

"I, Helena Day Snyder, being of sound mind and in possession of all my faculties, on the eve of my marriage to John J. McGlone, in London, England, on February 4th, 1922, wish to record, of my free will, that as I already possess, in my own right, ample of this world's goods in the way of a fortune of my own, as a compliment to my aforesaid husband, and for other good and sufficient reasons, I hereby, voluntarily renounce all right, title and interest I might, legally or otherwise, have in any estate, real or personal, of which my said husband to be, John J. McGlone, might die seized, Helena Day Snyder."

The decedent died a resident of this county on February 22, 1937, survived by the widow, a sister, two brothers, and three nephews, sons of deceased brothers, as his only statutory distributees. His estate as valued in the estate tax proceedings, of which this court may take judicial notice (Matter of Surpless, 143 Misc., 48, 50; Matter of Moringstar, 143 Misc., 620, 623; Matter of Blake, 146 Misc. 780, 781-782; Matter of Goldwitz, 153 Misc., 182, 184; Matter of Greenberg, 158 Misc., 446, 448; Matter of Reilly, 165 Misc., 214, 218; Matter of Grube, 7 N. Y. S. 2d, 794, 798, not otherwise reported) amounted to $236,852.74.

His will was executed on August 21, 1930, and a codicil thereto was dated on July 6, 1934. Both were admitted to probate in this court on April 8, 1937. By reason of the execution of the codicil subsequent to August 31, 1930, the composite testamentary disposition is brought within the purview of section 18 of the Decedent Estate Law (Matter

of Greenberg, 141 Misc., 874, 880, 881, aff'd 236 App. Div., 733, aff'd 261 N. Y., 474), with the result, since the valid inception of the marriage is both demonstrated and admitted, that the widow is presumptively entitled (Matter of Green, 155 Misc., 641, 649, aff'd 246 App. Div., 583; Matter of Vogel, 251 App. Div., 741) to receive a testamentary benefit, at least partly in cash and the balance on a life trust, amounting to $118,426.37 (Decedent Estate Law, sec. 83, sub-div. 4; Decedent Estate Law, sec. 18, subdiv. 1a). The testamentary instruments, as probated gave her a general legacy of $2,000.00 and no more.

In view of the noted presumption which arises by reason of the demonstration of the valid marriage between the parties, the burden is imposed upon those contending for a contrary result to show some legal reason why the right of election accorded by section 18 of the Decedent Estate Law and asserted by the widow should not be effectuated. By reason of the composite demonstration it is presently immaterial whether this burden is one of proof or merely of going forward.

Since the right of election accorded to a surviving spouse by section 18 is absolute except as expressly conditioned by the terms of the section, the burden is imposed upon the petitioners who seek a determination that such right is not possessed by this widow to demonstrate the existence of some exception in the statute which has the effect of depriving her of its benefits. They point for this purpose to subdivision 9 of section 18, which reads: "9, The husband or wife during the lifetime of the other may waive the right of election to take against a particular last will and testament by an instrument subscribed and duly acknowledged, or may waive such right of election to take against any last will and testament of the other wheatsoever in an agreement so executed, made before or after marriage. An agreement so executed made before the taking effect of this section wherein a spouse has waived or released all rights in the estate of the other spouse shall be deemed to release the right of election granted in this section."

Two matters are notable in the language employed in this section. The first is that the only variety of document which, under its language, is declared effective to bar the

elective right of the surviving spouse is one which is "subscribed and duly acknowledged." This requirement is prescribed whether such document be "an instrument" required for waiver of the right to elect against an identified will, or "an agreement" prescribed as prerequisite if all rights of the surviving spouse, in their entirety, are to be relinquished. In other words, this requirement of acknowledgment is expressly stipulated in respect of each of the three varieties of documents contemplated in the section, namely, the "instrument" of waiver against a single identified will the "agreement" of waiver against any will which is executed after the effective date of the statute, and the "agreement" of waiver or release executed prior to the effective date of the statute.

According to the terms of the subsection it is only a document of this particular description and presenting this prescribed characteristic which will be effective for the purpose of depriving the surviving spouse of the enlarged statutory rights of participation in the estate of her deceased husband accorded her by section 18. In view of the remedial nature of the legislation effected in this enactment as a whole and the liberal interpretation of its terms in favor of the enlarged rights of the survivor which has continuously been practiced and enjoined (Matter of Byrnes, 260 N. Y., 465, 474; Rubin *v.* Myrub Realty Co., Inc., 244 App. Div., 541, 544; Matter of Greenberg, 141 Misc., 874, 885-886, aff'd 236 App. Div., 733, aff'd 261 N. Y. 474, 479; Thompson *v.* Thompson, 163 Misc., 946, 950, aff'd 254 App. Div., 601; Matter of Moore, 165 Misc., 683, 690; Matter of Collins, 156 Misc., 783, 785; Matter of Brown, 153 Misc., 282, 287; Matter of Harris, 150 Misc., 758, 760, 761; Matter of Simeone, 141 Misc., 737, 746), it seems apparent that any document should be subject to strict scrutiny which is tendered in support of a contention that the relief made available for spouses in general may not be claimed by the particular spouse whose rights are in question.

The present document does not comply with the specification of the statute which is applicable in this regard, namely, that the rights of a surviving spouse may be foreclosed only by an "agreement" subscribed and duly "acknowledged," since this instrument is not acknowledged. The opponents

of the widow contend, however, that if the statute be interpreted as invalidating this instrument, it must be held to be in contravention of article 1, section 10, paragraph 1, of the United States Constitution, and therefore void. The inhibition thus raised is, of course, that "No state shall * * * pass any * * * Law impairing the obligation of contracts."

The question is accordingly presented as to whether this unilateral declaration granting for purposes of argument its validity for any purpose is a contract within the contemplation of the Federal Constitution.

In Louisiana *v.* Mayor of New Orleans (109 U. S., 285, 288), and again in Morley *v.* Lake Shore Railway Co. (146 U. S. 162, 170) The United States Supreme Court said: "The term 'contract' is used in the Constitution in its ordinary sense, as signifying the agreement of two or more minds, for considerations proceeding from one to the other, to do, or not to do, certain acts. Mutual assent to its terms is of its very essence."

To this may be added the statement by the same tribunal in Edwards *v.* Kearzey (96 U. S., 595, 599-600): "A contract is the agreement of minds, upon a sufficient consideration, that something specified shall be done, or shall not be done."

It is obvious from these statements that in constitutional issues the concept of a contract is precisely the same as in ordinary litigations. The two indispensable essentials are an agreement or "meeting of the minds" of the contracting parties and a consideration moving to the person against whom enforcement of the asserted agreement is sought. Without these two elements no contract can be demonstrated to exist and no constitutional question may arise.

"The prohibition of the federal Constitution was intended to secure the observance of good faith in the stipulation of parties against any State action. Where a transaction is not based upon any assent of parties, it cannot be said that any faith is pledged with respect to it; and no case arises for the operation of the prohibition" (Louisiana *v.* Mayor of New Orleans, 109 U. S., 285, 288).

"No matter what the actual motive may have been, by the express or implied terms of the supposed contract, the

promise and the consideration must purport to be the motive each for the other, in whole or at least in part. It is not enough that the promise induces the detriment or that the detriment induces the promise if the other half is wanting" (Wisconsin & Michigan Railroad *v.* Powers, 191 U. S., 379, 386).

The document here in question does not purport to constitute a contract or agreement. It is a declaration of purpose and intention by the prospective bride only. Not only is no promise made by her but no consideration is expressed or implied. It is closely analogous to those situations which have repeatedly been litigated and in which the uniform determination has been made that no contract was consummated, in which a state has announced a given policy, later reversed, upon which individuals have sought to predicate contract rights. Respecting such a situation Mr. Justice Holmes, writing for the unanimous court, said in Wisconsin & Michigan Railroad *v.* Powers (191 U. S. 379, 386) "the presence or absence of consideration is an aid to construction in doubtful cases—a circumstance to take into account in determining whether the state has purported to bind itself irrevocably or merely has used words of prophecy, encouragement or bounty, holding out a hope but not amounting to a covenant."

Here there is no promise—merely a declaration of intention. There is also no consideration either recited or demonstrated. In attempted avoidance of this difficulty the petitioners urge that the decedent married the present widow and that marriage has been held to constitute a valid consideration. Granting both premises, there is no inference on the record that the marriage two days later was viewed by the parties as a consideration for the declaration. It is primary that nothing may be deemed a consideration which is not so considered by both parties (Walton Water Co. *v.* Village of Walton, 238 N. Y., 46, 51; Beck *v.* Sheldon, 259 N. Y., 208, 211; Edrington-Minot Corp'n *v.* Garsson, Inc., 219 App. Div., 65, 67). "The fortuitous presence in a transaction of some possibility of detriment, latent but unthought of, is not enough * * *. Promisor and promisee must have dealt with it as the inducement to the prom-

ise" (McGovern *v.* City of New York, 234 N. Y., 377, 389; Walton Water Co. *v.* Village of Walton, 238 N. Y., 46, 51).

Even had it been demonstrated in the present case that the parties considered the consummation of the marriage to be a consideration for the agreement by the bride-elect, of which there is not the slightest indication, this could not, on the showing of the record, supply the requisite consideration for an agreement by the widow, since it is obvious that the parties had already agreed to intermarry and it is elementary that an agreement to do an act which one is already obligated to perform, or actual performance thereof, does not supply an adequate consideration for a new agreement by the person in whose favor the obligation already exists (Carpenter *v.* Taylor, 164 N. Y., 171, 177; O'Meara Co. *v.* Nat. Park Bank, 239 N. Y., 386, 399; 269 Canal Street Corp'n *v.* Zurich General Accident & Liability Ins. Co., 226 App. Div., 516, 519, aff'd 252 N. Y., 603; Melnick *v.* Kukla, 228 App. Div., 321, 324).

It is obvious, therefore, that the document in question, not having been acknowledged, does not comply in this regard with the only variety of instrument which under subdivision 9 of section 18 of the Decedent Estate Law will be effective to bar the widow's right of election.

The infirmity of the document does not, however, terminate here. The subdivision expressly prescribes the particular variety of instrument which is requisite for a waiver of the rights of election of a surviving spouse against all wills or in situations in which it was executed prior to the effective date of the statute. In both such connections such instrument must be "an agreement." This term is a word of art possessing a well defined and thoroughly established meaning in the law not only of this state but of every other common-law jurisdiction.

An "agreement" is a mutual assent (Rohr *v.* Baker, 10 Pac., 627, 13 Or., 350; Johnes *v.* Williams, 40 S. W., 353, 367, 139 Mo., 1; Richardson *v.* Clements, 89 Pa., 503, 505; United States *v.* Richards, 149 Fed., 443, 451; Carter *v.* Prairie Oil & Gas Co., 160 Pac., 319, 322, 58 Okl., 365; Dixie Fire Ins. Co. *v.* Wallace, 156 S. W., 140, 141, 153 Ky., 677; Williams *v.* Diesel, 165 Pac., 187, 188, 65 Okl., 163) or com-

ing together in accord or meeting of the minds (Leonard *v.* Marshall, 82 Fed., 396, 399; United States *v.* Richards, 149 Fed., 443, 451; Southern Surety Co. *v.* Phillips, 24 S. W., 2d, 870, 872, 181 Ark., 14), of two or more parties (Jones *v.* Williams, 40 S. W., 353, 367, 139 Mo., 1; Arnold *v.* Scharbauer, 116 Fed., 492, 497; Richardson *v.* Clements, 89 Pa., 503, 505; Carter *v.* Prairie Oil & Gas Co., 160 Pac., 319, 322, 58 Okl., 365; Tucker *v.* Pete Sheeran Bro. & Co., 160 S. W., 176, 178, 155 Ky., 670; Williams *v.* Diesel, 165 Pac., 187, 188, 65 Okl., 163; Southern Surety Co. *v.* Phillips, 24 S. W., 2d, 870, 872, 181 Ark., 14), on a consideration (Arnold *v.* Scharbauer, 116 Fed., 492, 497). The term connotes a mutual obligation (Benedict *v.* Pineus, 191 N. Y., 377, 383, 384; Moran *v.* Standard Oil Co., 211 N. Y., 187, 197; Davis *v.* Frank, 102 Misc. 683, 684), and is synonymous with the word "contract" (Durham *v.* Taylor, 29 Ga., 176; Sage *v.* Wilcox, 6 Conn., 81, 84; Barnard *v.* Lancashire Ins. Co., 101 Fed. 36, 37; United States *v.* Edgar, 45 Fed. 44, 46; Michael *v.* Kennedy, 148 S. W., 983, 984, 166 Mo. App., 462; Douglass *v.* Williams Art Co., 85 S. E., 993, 143 Ga., 846; Moss *v.* Winston, 118 So., 739, 740, 218 Ala., 364). As is said in Bingham *v.* Insurance Co. of North America (43 N. W. 494, 495, 74 Wis., 498): "To constitute an agreement, the minds of both parties must meet. That means that one mind can not make an agreement alone; that both must understand the agreement alike and must assent to that agreement; or, to use the term the law uses in such case, the minds of the parties must meet upon the subject of the agreement" (see also White *v.* Kingston Motor Car Co., 69 Misc. 627, 628). Mutual assent and obligation are inherent in the legal conception of an agreement, wherefore purely unilateral action as in the giving of a quitclaim can never constitute an "Agreement" (Chamberlain *v.* Abrams, 79 Pac., 204, 205, 36 Wash., 587).

The present document does not purport to be even so much as a quitclaim. It is merely a unilateral statement of intention and is accordingly not an "agreement" within the well established connotation of the term.

Those seeking to profit at the expense of the widow contend, however, that when the Legislature twice employed this word of definite legal meaning it did not intend to use

it in the sense in which it is habitually employed and designed merely to require a unilateral waiver. As authority for this position they tender Matter of Moore (165 Misc., 683). The court is familiar with this decision and despite its high regard for its distinguished author, has already expressed its inability to concur in his view (Matter of Shapiro, 154 Misc., 55, 58).

That a waiver of the right to elect against a single identified will may be accomplished by a unilateral instrument is unquestionable because the Legislature has expressly so provided. In respect of a waiver against any will made either before or after the effective date of the statute, the Legislature has pointedly and with reiteration adopted a diverse provision phrased in language possessing a well established legal connotation, and this court does not feel itself justified in holding that these expressly and to its mind, deliberately chosen, diverse requirements are capable of being accorded a meaning identical with that aptly but differently described in respect of waiver of the right to elect against the provisions of an identified will.

As has hereinbefore been indicated the word "agreement" possesses a well defined meaning in the law, and it is an established principle of statutory construction that in such a situation its technical connotation must be accorded to it in the absence of unmistakable demonstration of a contrary intention (Perkins *v.* Smith, 116 N. Y., 441, 448; People, &c., *v.* Wainwright, 237 N. Y., 407, 412; People ex rel. Hunt *v.* Lane, 132 App. Div. 406, 407-408, aff'd 196 N. Y., 520), which is here absent.

In the opinion of the court, therefore, the document tendered for the purpose of defeating the elective rights of the widow is defective and invalid for that purpose, both by reason of the fact that it is not acknowledged and because it is not the type of document, namely "an agreement," which has been prescribed by the Legislature for the purpose.

In view of its inadequacy under the provisions of subdivision 9 of section 18 of the Decedent Estate Law and the fact that it does not constitute an enforcible contract or agreement at common law inhibiting the assertion of elective rights, its efficacy, if any, for the purpose of disinherit-

ing the widow must be predicated upon the equitable doctrines of waiver or estoppel.

To establish waiver, it must be shown that there was a deliberate, informed abandonment of known rights (Alsens American Cement Works *v.* Deghon Contracting Co., 222 N. Y., 34, 37; Draper *v.* Oswego County Fire Relief Ass'n, 190 N. Y., 12, 16; Ansorge *v.* Belfer, 248 N. Y., 145, 150; Matter of Feldhus, 165 Misc., 122, 123, aff'd 254 App. Div., 903, aff'd 280 N. Y.—20 N. E., 2d, 17; Matter of Heim, 166 Misc., 931, 937, aff'd 255 App. Div., 1007; Matter of Miller, 162 Misc., 563, 571, aff'd 252 App. Div., 872). Here there is no such demonstration. On the contrary no evidence has been introduced in support of the allegation, expressly denied by the widow, that at the time of its signature she had "knowledge of the nature, terms and effect" of the document. The petitioner has, therefore, failed to demonstrate a situation to which the equitable doctrine of waiver is applicable.

To constitute an estoppel against her, it must have been demonstrated that the testator altered his position in reliance on the document (Lawrence *v.* Brown, 5 N. Y., 394, 409; Mfrs. & Traders Bank *v.* Hozard, 30 N. Y., 226, 230; Continental Nat. Bank *v.* National Bank of Commonwealth, 50 N. Y., 575, 581; Blair *v.* Walt, 69 N. Y., 113, 116; Rothschild *v.* Title Guar. & Trust Co., 204 N. Y., 458, 464; Matter of Leverich, 135 Misc., 774, 778, aff'd on opinion of this court 234 App. Div., 625). Of any such situation the record contains not a scintilla of evidence.

The court therefore deems the document submitted in defeat of the rights of the widow wholly nugatory on grounds entirely different from those upon which its former decisions denying judgment on the pleadings to the petitioners were predicated (166 Misc., 636; 169 Misc., 498). It bows to the superior authority of the Appellate Division of this department in its determination (Matter of Rogers, 250 App. Div., 26, 28) that in dealings between husband and wife or prospective spouses "there is no presumption of inequality either way from these relations merely," although it must confess to some difficulty in reconciling this position with the statements of the Court of Appeals in such cases as Matter of Smith (95 N. Y., 516, 522), Pierce *v.*

Pierce (71 N. Y., 154, 148), Graham *v.* Graham (143 N. Y., 573, 580), Marx *v.* McGlynn (88 N. Y., 357, 371) and Matter of Putnam (257 N. Y., 140, 143). In any event, this portion of the rule of the case has now become immaterial in view of its further statement: "But when it appears prima facie that the pa ies have been dealing with each other under circumstances of inequality, then a presumption arises against the husband especially if the transaction has resulted in detriment to the wife."

Here the prospective wife, on the eve of her marriage, was induced to sign a document, not prepared by her, knowledge of the nature, terms and effect of which she denies, the effect of which is to deprive her, utterly without any intimation or semblance of consideration of rights of inheritance worth $116,426.37. If this demonstration is not a prima facie sufficient indication of inequality and overreaching on the part of the prospective husband, to require his estate to come forward with some explanation demonstrating that no advantage was taken by him of the relationship which the Court of Appeals has on at least two occasions held to be one of confidence and justified reliance (Pierce *v.* Pierce, 71 N. Y., 154, 158; Graham *v.* Graham, 143 N. Y., 573, 580) it would seem that the effect of subsection 9 of section 18 of the Decedent Estate Law, as interpreted, has made it possible for a designing spouse or prospective spouse to nullify the entire beneficent purpose of the enactment with virtual impunity.

The court can not believe this to be the law. On the contrary, it conceives the correct doctrine to be the "the courts regard with rigid scrutiny an ante-nuptial contract which deprives her (the wife) of any prospective interest in the estate of her intended husband, and especially is this required in a case where such relinquishment on her part is made without any provision for her support in case she survives him" (Graham *v.* Graham, 143 N. Y., 573, 580) and "that the courts require strict proof of fairness, when called upon to enforce an ante-nuptial contract against the wife, and especially when it is apparent that the provision made for the wife is inequitable, unjust and unreasonably disproportionate to the means of the husband. *The rule undoubtedly is that in such a case every presumption is*

against the validity of the contract, and the burden of proof is cast upon the husband, or those who represent him, in order to uphold and enforce the same as a valid and subsisting agreement" (Pierce *v.* Pierce, 71 N. Y. 154, 158). Italics not in original.

For the reasons stated the court determines that the present widow is entitled to assert and has validly claimed her right of election to take her intestate share in contravention of the terms of the will pursuant to the provisions of section 18 of the Decedent Estate Law.

Enter decree on notice in conformity herewith.